

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs September 16, 2008

JOHN E. SCALES v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Hickman County
No. 08-5004C Robbie Beal, Judge

No. M2008-00622-CCA-R3-HC - Filed November 13, 2008

The petitioner, John E. Scales, appeals the circuit court's order summarily dismissing his pro se petition for writ of habeas corpus. Following our review of the record and applicable law, we affirm the court's order.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR. and ROBERT W. WEDEMEYER, JJ., joined.

John E. Scales, Only, Tennessee, Pro Se.

Robert E. Cooper, Jr., Attorney General and Reporter; Deshea Dulany, Assistant Attorney General, for the appellee, State of Tennessee.

OPINION

The record in this case reflects that the petitioner was convicted by jury of first degree felony murder and attempted aggravated robbery. He received a sentence of life imprisonment for the murder conviction and a concurrent sentence of three years for the attempted aggravated robbery conviction. The petitioner's convictions and sentences were affirmed on direct appeal. *See State v. John Earl Scales*, No. 01C01-9709-CR-00412, 1999 WL 90203 (Tenn. Crim. App. at Nashville, Feb. 24, 1999), *perm. app. denied* (Tenn. Nov. 15, 1999). Subsequently, the petitioner unsuccessfully sought post-conviction relief. *See, e.g., John Earl Scales v. State*, No. M2003-01753-CCA-R3-PC, 2004 WL 1562542 (Tenn. Crim. App. at Nashville, July 13, 2004), *perm. app. denied* (Tenn. Nov. 8, 2004).

On January 18, 2008, the petitioner filed a pro se petition for habeas corpus relief, alleging that he was entitled to relief because he was exposed to an illegal sentencing scheme which violated his constitutional right to a jury trial as set forth in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct.

2531 (2004) and its progeny.¹ The circuit court summarily dismissed the petition and the petitioner now appeals.

Article I, section 15 of the Tennessee Constitution guarantees the right to seek habeas corpus relief. Tennessee Code Annotated sections 29-21-101 through 29-21-130 codify the applicable procedures for seeking a writ. However, the grounds upon which a writ of habeas corpus may be issued are very narrow. *Taylor v. State*, 995 S.W.2d 78, 83 (Tenn. 1999). A writ of habeas corpus is available only when it appears on the face of the judgment or the record of the proceedings upon which the judgment was rendered that a court was without jurisdiction to convict or sentence the defendant or that the defendant is still imprisoned despite the expiration of his sentence. *See Summers v. State*, 212 S.W.3d 251, 255 (Tenn. 2007); *Archer v. State*, 851 S.W.2d 157, 164 (Tenn. 1993); *Potts v. State*, 833 S.W.2d 60, 62 (Tenn. 1992). The purpose of a habeas corpus petition is to contest void and not merely voidable judgments. *Archer*, 851 S.W.2d at 163. A void judgment is a facially invalid judgment, clearly showing that a court did not have statutory authority to render such judgment; whereas, a voidable judgment is facially valid, requiring proof beyond the face of the record or judgment to establish its invalidity. *See Taylor*, 995 S.W.2d at 83. The burden is on the petitioner to establish by a preponderance of the evidence, “that the sentence is void or that the confinement is illegal.” *Wyatt v. State*, 24 S.W.3d 319, 322 (Tenn. 2000). Moreover, it is permissible for a court to summarily dismiss a petition for habeas corpus relief, without the appointment of counsel and without an evidentiary hearing, if the petitioner does not state a cognizable claim. *See Summers*, 212 S.W.3d at 260; *Hickman v. State*, 153 S.W.3d 16, 20 (Tenn. 2004).

In his appellate brief, petitioner re-asserts that he is entitled to habeas relief because Tennessee’s sentencing procedure deprived him of his “constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his punishment.” The petitioner relies on *Cunningham* because the case applies the ruling in *Blakely* that facts relied upon to enhance a defendant’s sentence (other than prior convictions) must be found by a jury and not a judge. *See Cunningham*, 127 S.Ct. at 865.

The petitioner is not entitled to habeas corpus relief. To begin, we note that neither *Blakely* nor *Cunningham* is implicated because the petitioner’s sentences were not enhanced beyond the presumptive minimum. The petitioner’s judgments of conviction reflect that the petitioner received the minimum punishment of life imprisonment for his felony murder conviction. Tenn. Code Ann. § 39-13-202(c)(3). Likewise, the petitioner received the minimum sentence of three years for his attempted aggravated robbery conviction, a Class C felony. Tenn. Code Ann § 40-35-112(a)(3).

¹ The petitioner also relies on *Cunningham v. California*, 549 U.S. 270, 127 S.Ct. 856 (2007). *Blakely* held that any fact other than that of a prior conviction used to enhance a defendant’s sentence must be proven to a jury beyond a reasonable doubt. 542 U.S. at 30. *Cunningham* applied the holding in *Blakely* and invalidated California’s determinate sentencing law because it allowed a trial court to enhance a defendant’s sentence based on facts found by the judge by a preponderance of the evidence. 549 U.S. at ----, 127 S.Ct. at 868.

In addition, this court has repeatedly held that *Blakely* violations do not apply retroactively to cases on collateral appeal. *See, e.g., Billy Merle Meeks v. Ricky J. Bell, Warden*, No. M2005-00626-CCA-R3-HC, 2007 WL 4116486 (Tenn. Crim. App., at Nashville, Nov. 13, 2007), *perm. app. denied* (Tenn. April 7, 2008); *Timothy R. Bowles v. State*, No. M2006-01685-CCA-R3-HC, 2007 WL 1266594 (Tenn. Crim. App., at Nashville, May 1, 2007); *Ulysses Richardson v. State*, No. W2006-01856-CCA-R3-PC, 2007 WL 1515162 (Tenn. Crim. App. May 24, 2007), *perm. app. denied* (Tenn. Sept. 17, 2007) (“Apprendi/Blakely type issues regarding allocating fact-finding authority to judges during sentencing are not in the narrow class of procedural rules that apply retroactively.”); *James R.W. Reynolds v. State*, No. M2004-02254-CCA-R3-HC, 2005 WL 736715 (Tenn. Crim. App., at Nashville, Mar. 31, 2005), *perm. app. denied* (Tenn. Oct. 10, 2005). We further note that the decision of *Blakely* relates to constitutional violations which, even if proven true, would merely render the judgment voidable and not void. *See, e.g., Meeks*, 2007 WL 4116486; *Bowles*, 2007 WL 1266594; *Donovan Davis v. State*, No. M2007-00409-CCA-R3-HC, 2007 WL 2350093, (Tenn. Crim. App., at Nashville, Aug. 15, 2007), *perm. app. denied* (Tenn. Nov. 13, 2007).

In sum, nothing on the face of the petitioner’s judgments indicate that the convicting court was without jurisdiction to sentence the petitioner or that the petitioner’s sentences have expired. Accordingly, the petitioner failed to state a cognizable claim for habeas corpus relief, and the circuit court did not err in summarily dismissing his petition. The judgment of the circuit court is affirmed.

J.C. McLIN, JUDGE